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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-176

FRANK VISERTO,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

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No.

FRANK VISERTO,

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—against—

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a Writ of Certiorari issue to review the order of the Court of Appeals of the State of New York, rendered the 7th day of July, 1971 which affirmed the order of the New York Supreme Court, Appellate Division, Second Department, two justices dissenting, which in turn had affirmed the judgment of the Supreme Court, Queens County, convicting the petitioner of the crimes of robbery, first degree, grand larceny, first degree and two counts of assault, second degree. The trial court had sentenced the petitioner to the Elmira Reception Center on the grand larceny and assault counts but had suspended a 10 to 30 year term on the robbery.

It is significant however, that two Justices of the Appellate Division, Second Department, dissented and voted to dismiss the indictment as a matter of law on the grounds that the evidence was insufficient.

Opinion Below

The Court of Appeals affirmed the Appellate Division without opinion.

The Appellate Division rendered a decision which is reprinted in Appendix A herein. Two Justices dissented and voted to reverse and dismiss the indictment.

The Trial Court rendered no written opinion.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

Questions Presented

1. Whether the identification procedure employed by the Police following the arrest of petitioner was in accordance with constitutional standards?

2. Whether there was probable cause to make an arrest of the petitioner in this case?

3. Whether the defendant was deprived of due process of law because the District Attorney failed to make an opening statement as required by the New York statutes?

Constitutional and Statutory Material Involved

The Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution must be considered.

Section 388(1) of the New York Code of Criminal Procedure must also be considered. Section 388 of the New York Code of Criminal Procedure provides, *inter alia*:

> "1. The District Attorney, or other counsel for the People, *must* open the case".

Statement of the Case In Brief

This case involves an alleged robbery at the Fair Motor Inn by two masked perpetrators. There were two victims of this robbery, namely the night manager, Harold Kennelly, and the night bellboy, Daniel Adomovich. Neither of these two victims were able to identify the perpetrators. One of the perpetrators allegedly was wearing a red sweater of a type which both victims admitted was not uncommon.

One Peter Mark, who had also been employed at the Fair Motor Inn, but who had not been working on the night of the robbery, alleged that four days before the robbery, namely on the 8th of September, 1965, he had met the petitioner and the co-defendant Scocozza and that Scocozza had mentioned the fact that they might hold up the Fair Motor Inn that very night. Mark later reported this to Kennelly, who in turn informed the police. The robbery as planned or announced, never took place on the night of the 8th of September, 1965.

On the 12th of September, 1965, however, at about 4:20 A.M. there was a robbery and $300 some odd dollars were taken, but no one was injured and neither of the perpetrators could be identified.

Detective Heslin arrested the petitioner Viserto and the co-defendant Scocozza. They were brought to the Precinct

where no line-up was held and no identification by the victims could be made. The petitioner however was wearing a red sweater and this was sufficient as far as the detective was concerned to cause him to be arrested.

No warrant for an arrest was obtained, nor was any search warrant obtained to seize the sweater.

This was the entire case against the petitioner. Peter Mark admitted that he had never met the petitioner prior to the 8th day of September, 1965 and had had no contact with him thereafter.

The People called four witnesses, namely, Peter Mark, Harold Kennelly, Daniel Adomovich and Detective Heslin. Peter Mark testified as set forth previously. (26-28; 28-34; 36; 42; 38-40; 47-48)*

Harold Kennelly, the Fair Motor Inn manager, conceded that he had received information from Peter Mark on the 8th of September, 1965 about the planned hold-up (57).

It is fair to say that there is a great deal of crime in New York and no doubt when the crime did not occur on the 8th of September, 1965, police surveillance was not continued.

On the 12th of September, 1965, at about 4:20 A.M., the robbery by two masked men, one wearing a red sweater, did occur and about $308.00 was taken. No injuries whatsoever were inflicted (57-59).

Kennelly stated he could not identify either robber and all he could say was that the persons arrested had a similar build (63).

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* Numerals in parenthesis refer to the pages of the Appendix in the Court below.

Daniel Adomovich, age 20, stated that he too could not identify either of the robbers although he recalled that one of them wore a red sweater, but he could not identify either one (68).

Detective Heslin asserted that he picked up the two defendants, that is petitioner herein and Scocozza and brought them to the station house later on the 12th of September, 1965 (72-73).

Neither of the defendants testified or called witnesses in their behalfs.

POINT I

There was no basis for any arrest of the petitioner herein. The police had no probable cause to believe that petitioner was involved in any crime since there had been no identification of him whatsoever and the crime charged occurred not on the 8th of September as was predicted by Peter Mark, but rather on the 12th of September, which had no relationship to anything Peter Mark had prognosticated.

—A—

The identification procedure used was also improper and it was error to arrest petitioner solely because he was wearing a red sweater.

The crime herein was perpetrated by two masked men, neither of whom could be identified by the victims. While it is true that on the 8th of September, 1965, Peter Mark who was employed by the Fair Motor Inn had notified his manager, Mr. Kennelly that there might be a robbery by the petitioner and one Scocozza, that robbery never occurred.

New York hotels, especially motor inns, are the subject of many crimes. On the 12th of September, 1965, at about 4:20 A.M. as indicated previously, two masked perpetrators did hold the premises up and took about $308.00 but inflicted no injuries.

At this juncture, it is impossible to conceive that there was any basis for an arrest without a warrant of the petitioner. Nevertheless, Detective Heslin arrested the petitioner and brought him to the station house merely because he had been wearing a red sweater.

Both victims declared that the red sweater was of the type which they had seen previously.

No line-up was held but the petitioner was exhibited to the victims merely because he was wearing a red sweater.

The sweater itself, of course, was admitted into evidence and no doubt had a virulent effect upon the trier of the facts. While no motion to suppress the sweater as such had been made, it is nevertheless clear that there was sufficient basis to void the arrest itself because there was no probable cause demonstrated for it.

Alexander Hamilton wrote about "the practice of arbitrary imprisonments" which he denounced as "the favored and most formidable instrument of tyranny". (Federalist No. 84). James Otis, likewise condemned the Colonial Writs of Assistance, since they required no showing of "probable cause" before a Magistrate. To the same effect is the condemnation of the notorious "lettres de Cachet" which were used in France at the time of our War of Independence.

"Our Constitution was framed . . . to make 'lettres de Cachet' impossible with us." (*United States* v. *Innelli*, D.C. Cir., 286 F.2d 731).

Mr. Justice Douglas of this Court in his dissent in *Draper* v. *United States*, 358 U.S. 307, stated that the only evidence of guilt was the arrest itself.

> "Good faith is not enough to constitute probable cause. That faith must be grounded on facts within the knowledge of the . . . agent, which in the judgment of the court would make his faith reasonable." *Director General of Railroads*, v. *Kastenbaum*, 263 U.S. 25, 28.

This Court, in *Mapp* v. *Ohio*, 367 U.S. 643, clearly held that the Fourth Amendment guarantees are applicable against the state through the due process clause of the Fourteenth Amendment. It is therefore enforceable by the same sanction of exclusion as is used against the Federal government itself.

Detective Heslin had absolutely no basis other than a conversation that he had concerning the fact that on the 8th day of September, the petitioner might participate in a robbery of the motel. There had been no robbery on the 8th of September. We must presume that this was a high crime area and consequently a robbery which took place on the 12th, does not necessarily imply in any respect, that the petitioner was involved.

In all respects Mark was an informer whose reliability had never been established.

In *Aguilar* v. *Texas*, 378 U.S. 108, as more recently reaffirmed in *Spinelli* v. *United States*, 393 U.S. 410, this

court declared that it must be established that the informant is in fact reliable and that the underlying circumstances show how the informant came by his information and demonstrate sufficient probability of credibility to allow the search of the premises in question to be made (but in this case to allow the arrest to be made). The standard of probable cause to arrest should not be lessened because of the fact that it is an arrest which results from the seizure of a sweater rather than a seizure itself.

There was absolutely no probable cause for an arrest in this case without a warrant anyway.

There was no testimony whatsoever in the record that Peter Mark had ever given reliable information or that his reliability was in any way established. Moreover, Detective Heslin had in no way been able to make independent observations to determine whether or not Peter Mark's information was in any way reliable.

Under the circumstances, at the very least, a warrant should have been obtained and certainly could have been obtained because there was no emergency or hot pursuit herein.

The identification procedure used after the arrest was highly suggestive and should not have been permitted to be presented to the trial court itself. The petitioner, because he was wearing a red sweater, was arrested and brought to the station house. There was no search warrant nor an arrest warrant. There had been no prior identification. At the Police Precinct, neither of the victims could identify the petitioner. He had no counsel.

No additional evidence was presented at the trial and Peter Mark was unable to establish that these were the perpetrators of the crime on September 12, 1965.

Based upon such flimsy evidence, the convictions occurred.

It is respectfully submitted that there was insufficient evidence as a matter of law to warrant any conviction herein and thus due process of law was violated.

The identification proceeding certainly was not in accordance with *United States* v. *Wade,* 388 U.S. 218.

In the *Wade* case, this court observed:

> "What is worth identification testimony even when uncontradicted testimony? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of such instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure."

(See also, Wall, Eye Witness identification in criminal cases); Accord: *Stoval* v. *Denno,* 388 U.S. 293 and *Gilbert* v. *California,* 388, U.S. 263.

See also, *People* v. *Brown,* 2 N.Y. 2d 238 where the Court of Appeals of New York held that it was unfair to show a suspect to victims alone and without a line-up.

It is respectfully submitted that the identification procedure which was disclosed to the trier of facts was highly improper and consequently should have been suppressed completely. (*Pointer* v. *Texas,* 380 U.S. 400)

POINT II

It was error for the prosecution to have omitted making an opening statement at the beginning of trial, since this was a jurisdictional error under the New York statutes and could not be waived. The petitioner was therefore deprived of the equal protection of the laws under the Fourteenth Amendment, because unlike other defendants in criminal cases, he did not have a preview of the charges.

Under the Code of Criminal Procedure, Section 388(1), it is mandatory that the prosecution "open" in a criminal case. This in effect gives the defendant an opportunity to prepare his defense because there is no bill of particulars generally permitted in a criminal case and the purpose of the opening is to apprise the defendant of what he faces. The Court of Appeals of New York in *People* v. *McLaughlin,* 291 N.Y. 480 held that the District Attorney "must" open in a case and his failure to do so was a jurisdictional error.

Under the circumstances, it is respectfully submitted that this violated the equal protection clause of the Fourteenth Amendment. It also deprived the petitioner of due process of law and a fair trial because unlike other defendants in criminal cases, he had no way of knowing what the prosecution intended to present.

CONCLUSION

The petition for certiorari should be granted and the order of the Court of Appeals should be vacated and the judgment of conviction should be reversed.

Respectfully submitted,

MICHAEL P. DIRENZO and IRVING ANOLIK,
Attorneys for Petitioner

IRVING ANOLIK,
Of Counsel.

Order and Judgment of Supreme Court, State of New York Appellate Division, Second Department, with Dissenting Opinion

PEOPLE, & C., res. v. FRANK VISERTO, Appeal by defendant from a judgment of the Supreme Court, Queens County, rendered June 9, 1967, convicting him of robbery in the first degree and other related crimes, after a non-jury trial, and imposing sentence.

Judgment affirmed. No opinion.

Hopkins, Latham and Brennan, JJ., concur.

Samuel Rabin, Acting P.J., and Martuscello, J., dissent and vote to reverse the judgment and dismiss the indictment, with the following memorandum:

The evidence was purely circumstantial and, in our opinion, inadequate to justify conviction (People v. Weiss, 290 N.Y. 160, 163).

Order of Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

FRANK VISERTO,

Defendant-Appellant.

The judgment is affirmed. No opinion. July 7, 1971.

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Clerk of the Court